Appeal No. CA-2025-001370
CA-2025-001373

IN THE COURT OF APPEAL

(CIVIL DIVISION)

BETWEEN:

(1) ST PATRICK'S INTERNATIONAL COLLEGE LIMITED

(2) LONDON COLLEGE OF CONTEMPORARY ARTS LIMITED

(3) INTERACTIVE MANCHESTER LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

RESPONDENTS' SKELETON ARGUMENT

15 July 2025

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*References to the decision of the Upper Tribunal ("**UT**") are in the form **UTD[x]** and references to the decision of the First-tier Tribunal ("**FTT**") are in the form **FTTD[x]***

Suggested pre-reading:

- *Decision of the FTT dated 3 May 2023*
- *Decision of the UT dated 24 March 2025*
- *The parties' skeleton arguments*

A. Fiscal Neutrality

Ground (i)

1. There is no dispute that the principle of fiscal neutrality must be respected by a Member State when implementing the education exemption in Article 132(1)(i) PVD, such that

similar supplies of education which are made by similar suppliers must be treated equally (as the UT explained at **[UTD[49]**).

2. In the present case, the FTT found on the facts that there were substantial differences between universities, colleges of universities and FECs on the one hand and APs with designated courses on the other – because the regulatory regime for the former was "*significantly stronger*" than that for the latter and "*these differences were not merely differences of detail, but differences of degree and substance*" (see **[UTD[20]**). The UT rejected the Appellants' challenges to those findings (see **[UTD[53]-[57]**).

3. The issue under Ground (i) is whether those substantial differences in regulation have to be ignored when a Member State decides which suppliers of education to recognise for purposes of Article 132(1)(i) PVD as having objects similar to bodies governed by public law because those differences do not have (or cannot be proved to have) a significant influence on a typical consumer's decision. The Respondents ("**HMRC**") submit that both the FTT and the UT were right to reject that submission.

Supply/supplier conditions in the exemptions in Articles 132 and 134 PVD

4. The starting point of the analysis is to note the terms of Article 132(1)(i) PVD. It contains two conditions:

    - a supply condition: that the education be "*children's or young people's education, school or university education, vocational training or retraining*" – or "*the supply of services and goods closely related thereto*"; and

    - a supplier condition: that the education be provided by "*bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects*".

5. Not all of the exemptions in Articles 132 and 135 PVD contain any supplier condition. In the list of financial services and other exemptions in Article 135(1), a number of the exemptions contain no supplier condition – for example, the exemption for betting, lotteries and other forms of gambling at Article 135(1)(i). Equally, in the list of public interest exemptions in Article 132(1), the exemption for "*the supply of human organs, blood and milk*" at (d) contains no supplier condition.

6. Most of the other public interest exemptions in Article 132(1) do contain at least some form of supplier condition – for example, in Article 132(1)(c) the supply conditions is for "*the provision of medical care*", but there is also a supplier condition in that the medical care must be provided *"in the exercise of the medical and paramedical professions as defined in the Member State concerned*". In that exemption, the purpose of the supplier condition is to identify the nature/quality of the service being supplied (see Joined Cases C-443/04 and C-444/04 *Solleveld* EU:C:2006:257 ("***Solleveld***") at [37]).

7. However, the PVD itself recognises that seven of the seventeen exemptions in Article 132(1) impose distinct conditions on suppliers – those in subparagraphs (b), (g), (h), (i), (l), (m) and (n) ("**the seven exemptions**"). It is in respect of those exemptions that Member States are entitled under Article 133 to impose additional conditions on the grant of exemptions – but only where the exemptions are granted "*to bodies other than those governed by public law*".

8. Here, the purpose of the supplier condition in each of the seven exemptions (and the possibility of imposing the optional further conditions in Article 133) is to identify those suppliers which have a sufficient public interest element to their activities, so that they are comparable to bodies governed by public law making similar supplies[1].

9. Within the seven exemptions, there are differences in the wording used – notably in subparagraphs (l), (m) and (n). However, it is notable that four of the exemptions in Article 132(1) – those in subparagraphs (b) (hospital and medical care), (g) (goods and services closely linked to welfare and social security work), (h) (goods and services closely linked to the protection of children and young people) and (i) education – all contain similar phraseology, imposing a supplier condition that the supply be provided

[1] See, for example, the Opinion of Advocate General Colomer in *Kingscrest* at [25]-[32], in which he pointed out that bodies which were exempt under subparagraph (g) had to be of a "*social nature*" or "*social character*". And see also Arden LJ's comment in *Finance and Business Training* [2016] EWCA Civ 7 ("***FBT CA***") at [55] that, when Parliament identified the bodies which could benefit from the education exemption "*it has taken the view that the body must be one which provides education in like manner to a body governed by public law, that is there must be a public interest element in its work*".

by "*bodies governed by public law*", which is then extended to other similar bodies recognised by the relevant Member State.

10. The CJEU has held in a number of cases concerning three of those four exemptions (and only them) that Member States are entitled to recognise organisations as having "similar objects" to bodies governed by public law by reference to the framework of national law under which the relevant services are provided, including the relevant regulatory regimes applied to different organisations. That national legal framework may be found in national or regional provisions, legislative or administrative provisions, tax or social security provisions and whether the cost of the relevant services was largely met from public funds:

    - for Article 132(1)(b) – see Case C-45/01 *Dornier* EU:C:2003:595 at [72-73] and Case C-106/05 *L.u.P.* EU:C:2006:380 at [53];
    - for Article 132(1)(g) - see Case C-141/00 *Kügler* EU:C:2002:473 at [57-58] as well as Case C-498/03 *Kingscrest* EU:C:2005:322 at [53] and Case C-174/11 *Zimmermann* EU:C:2012:716 at [31]; Case C-594/13 *"go fair" Zeitarbeit* EU:C:2015:164 at [20]; Case C-335/14 *Les Jardins de Jouvence* EU:C:2016:36 at [35]; Case C-657/19 *Finanzamt D* EU:C:2020:811 at [44]; Case C-846/19 *EQ* EU:C:2021:277 at [70]; Case C-620/21 *Momtrade Ruse* EU:C:2023:395 at [91]; and
    - for Article 132(1)(h) – see *Kingscrest* at [53].[2]

11. There is (as yet) no CJEU case on whether Member States are entitled to adopt the same approach in relation to the education exemption in Article 132(1)(i) of recognizing bodies having similar objects to bodies governed by public law by reference to the framework of national law.

12. The CJEU was asked directly by the German Federal Supreme Finance Court in Case C-373/19 *Dubrovin & Tröger – Aquatics* EU:C:2021:873, whether that approach (as set out in *Zimmermann* at [31]) applied by analogy to the education exemption. The German

[2] For ease of reference, HMRC will refer to this caselaw as the *"Kingscrest"* line of authorities and to the exemptions in Article 132(b), (g) and (h) PVD as the "***Kingscrest-type exemptions***".

Court was "*inclined to the view*" that it did – see *Dubrovin* at [16] – but the CJEU decided that it did not need to answer that question (see *Dubrovin* at [34]).

13. Nevertheless, given the similarity in the wording and purpose of the supplier condition in Article 132(1)(i) with those in Articles 132(1)(b), (g) and (h), HMRC submit that Member States must be entitled to take into account the national legal framework when recognising organisations as having "*similar objects*" to bodies governed by public law under Article 132(1)(i).

14. That is supported by the CJEU judgment in Case C-319/12 *MDDP* EU:C:2013:778, which (as here) concerned the education exemption – and where the Court relied heavily on three of the *Kingscrest* line of authorities *(Kingscrest, L.u.P.* and *Zimmermann)* in paragraphs [25]-[38] of the judgment when interpreting Article 132(1)(i). The Advocate General (Kokott) expressly stated in her Opinion at [19] and (FN 5) that it was for each Member State to lay down the rules for recognition of education suppliers having similar objects to bodies governed by public law, applying *Dornier, L.u.P., Kingscrest* and *Zimmermann.* Similarly, the CJEU held at [37] that it was for the Member States to lay down the rules for recognition, citing *Kingscrest* at [49] and [51], as well as *Zimmermann* at [26]. This strongly suggests that the CJEU's guidance in *Kingscrest* at [53] and *Zimmermann* at [31] applies equally to the education exemption in Article 132(1)(i).

<u>*Assessing compliance with fiscal neutrality*</u>

15. The CJEU held in Joined Cases C-259/10 and C-260/10 *The Rank Group* EU:C:2011:719 at [32] that "*the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes*". It went on to hold at [41] that, where Member States are entitled to lay down national conditions for an exemption, they "*must respect the principle of fiscal neutrality inherent in the common system of VAT*".

16. As far as the approach to assessing compliance with fiscal neutrality, the CJEU held at [36] and [44] that there was an infringement of the principle of fiscal neutrality if there was "*a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer*".

17. Therefore, where two supplies have similar characteristics and any differences do not have a significant influence on the decision of the average consumer, then Member States must treat them equally for VAT purposes (including when setting any national conditions for exemption).

18. But, the issue in that case was whether the similarity of supplies was to be assessed from the point of view of the typical consumer. In *Rank,* the relevant exemption being considered was the betting and gaming exemption in Article 135(1)(f), which (as explained above) does not contain a supplier condition.

19. By contrast, where there is a supplier condition – at least within the seven exemptions – the CJEU has held that it is inherent in the system of VAT exemptions that not only similar, but also identical supplies**,** must be treated differently, depending on whether or not they satisfy the supplier condition.

20. In Case C-495/12 *Bridport and West Dorset Golf Club* EU:C:2013:861, which concerned the sports exemption in Article 132(1)(m), the issue was whether the UK was entitled to withdraw the exemption from supplies of green fees to non-members applying Article 133(d) where there was a likelihood of distortion of competition to the disadvantage of commercial golf courses which did charge VAT on green fees. The CJEU held at [36] that the UK could not withdraw the exemption, since the scope of the seven exemptions was "*defined not only by reference to the substance of the transactions covered, but also by reference to certain criteria that the suppliers must satisfy*" – and in *"providing for exemptions from VAT defined by reference to such criteria, the common system of VAT implies the existence of divergent conditions of competition for different operators*".

21. *Bridport* involved an attempt by the UK to ensure that all supplies of green fees were taxable. The *MDDP* case involves the converse situation, where Poland had purported to exempt all supplies of education, regardless of the supplier. The CJEU held at [35]-[36] that a general exemption of all supplies of education was contrary to Article 132(1)(i), since that provision "*does not permit member states to grant the supply of the educational services exemption to all private organisations providing such services by including those whose objects are not similar to those of bodies governed by public law*".

22. Accordingly, fiscal neutrality does not require equal treatment of all supplies which are substitutable from the consumer's perspective, where there is a supplier condition (or at least a supplier condition which falls within the seven exemptions).

23. This then leads to the key issue in the present appeal, which is whether fiscal neutrality is to be assessed from the consumer's perspective when applied to the supplier condition in the seven exemptions. The Appellants argue that this is required, such that the relevant regulatory regime under which the supplier operates is not a legitimate basis for distinction "*when it does not have a significant influence on the consumer's decision, or at least when there was no evidence that it did have a significant influence*" (see the Appellants' skeleton at 40).[3]

24. The difficulty with this argument is that the purpose of the supplier condition in the seven exemptions is to identify suppliers with a sufficient public interest element to their activities. The public interest nature of the supplier may affect the nature and quality of the supplies made – and therefore consumer choice. For example, in *LIFE* the Court of Appeal held at [73] that it was open to the UT to conclude that the services provided by state regulated private welfare bodies were significantly different to those provided by unregulated providers. But some of the factors which Member States can use in recognising the public interest nature of bodies which are not governed by public law may not (at least directly) affect the nature and quality of the supplies made (for example, governance criteria) – even though they may nevertheless be important to the public interest nature of those supplies.

25. The question that this raises with respect to the Appellants' Ground (i) is why would the CJEU expressly permit Member States to recognise bodies which are similar to bodies governed by public law by reference to the national (or indeed regional) regulatory structure, taking into account a variety of potential factors, but then require the Member State to ignore any aspect of that regulatory structure which might not affect consumer choice, even if (as here) it is more than a difference of detail, but a significant difference of "*degree and substance*" **[UTD/20]**?

26. The CJEU has repeatedly affirmed the applicability of the principle of fiscal neutrality in the *Kingscrest* line of authorities (for example, in *Dornier* at [42] and [69]). However, in doing so, it has not suggested that the comparison of suppliers subject to different

[3] Even in cases where fiscal neutrality is to be assessed from the consumer's perspective, Arnold LJ indicates in *LIFE* at [70] that evidence regarding the consumer's perspective is not ordinarily required; instead, "*the national court is expected to make an assessment using its own experience of the world*".

regulatory regimes should be limited by a requirement that any relevant differences had to be significant from a consumer's perspective - as the UT noted (see **UTD[36], [43]**). The CJEU has also mentioned fiscal neutrality in cases involving the education exemption in subparagraph (i), such as *MDDP* at [38] and *Happy Education* at [32] **(UTD[40], [46]**), but again has not suggested that the supplier condition should be analysed from the consumer's perspective.

The Appellants' contention that the FTT/UT's approach is inconsistent with case law

27. In their skeleton at 28-37, the Appellants rely on a number of authorities which they say are inconsistent with the FTT and UT decisions. Neither *Solleveld* nor *LIFE*, the two cases on which they principally rely, was cited to either Tribunal.

28. At 32, they rely on *Solleveld* [40] to argue that the CJEU has assessed similarity by reference to "*the point of view of recipients*" where there is a supplier condition. However, that case does not assist them:

- First, what the CJEU said at [40] was expressly limited to the exemption in Article 132(1)(c) and the context of medical care. It was not a case dealing with the *Kingscrest*-type exemptions in Article 132(1)(b), (g) and (h) (and, on HMRC's case, subparagraph (i)) where the CJEU has held that Member States may take the national regulatory framework into account when recognizing organisations having similar objects to bodies governed by public law. Therefore, it falls far short of a general statement that, wherever there is a supplier condition, similarity should be assessed from the point of view of the consumer;

- Secondly, the CJEU expressly indicated in *Solleveld* at [40] that similarity had to be assessed from the consumer's perspective, "*having regard to the objective pursued by that provision*". The CJEU had earlier explained that the objective of the supplier condition in the medical exemption was to ensure that it was restricted to care which was "*of sufficient quality having regard to the professional training of the providers*" (see [37]-[38]), which is therefore directly relevant to the consumer experience. The same cannot be said about the supplier condition in Article 132(1)(i) PVD;

- Thirdly, *Solleveld* is an old case (2006), predating both *Zimmermann* and *I GmbH*. If it had the broad application for which the Appellants now contend, one would have expected the CJEU to have said so at some point in the last 19 years. This is particularly so given the CJEU's propensity to develop its jurisprudence by repeating what it has said in previous cases. The lack of any mention of *Solleveld* in both the *Kingscrest* line of cases and in the cases expressly dealing with the education exemption (e.g. *MDDP* and *Happy Education*) suggests that the CJEU in *Solleveld* did not intend to establish a principle of general application to all supplier conditions.

29. In their skeleton at 33, the Appellants then argue that the UT's decision is at odds with the decision of the Court of Appeal in *LIFE Limited and another v HMRC* [2020] EWCA Civ 452 ("***LIFE***"). That case did concern one of the *Kingscrest*-type exemptions - the welfare and social security exemption in Article 132(1)(g).

30. The difficulty with that case is that, although Arnold LJ did accept at [61] that, in considering whether the UK's conferral of exemption on a regulated body satisfied fiscal neutrality, it had to be assessed whether the national regulatory regime "*made any significant difference to the consumer*", it is not clear on what legal basis he reached that conclusion.

31. Arnold LJ referred extensively to the *Kingscrest* line of authorities at [39]-[51], including referring specifically at [47]-[48] to the principle of fiscal neutrality as applied to Article 132(1)(g). But the only authority he cited which mentioned the analysis of fiscal neutrality from the point of view of the consumer was *Rank,* which was a case which did not involve a supplier condition at all. Nor were any of the four cases cited at [62], including *Solleveld,* which considered whether the regulatory framework may create a distinction in the eyes of the consumer, authorities dealing with the supplier conditions in subparagraphs (b), (g) or (h) of Article 132(1) PVD considered in the *Kingscrest* line of authorities.

32. The Appellants also refer at 31 of their skeleton, to *Rank* at [50], in which the CJEU cited Case C-357/07 *TNT Post UK Ltd v HMRC* ("***TNT Post***"). This also does not help the Appellants for three reasons:

- *TNT Post* was a case involving the postal exemption in Article 132(1)(a) – and not one of the seven exemptions;

- The betting and gaming exemption in issue in *Rank* did not involve a supplier condition at all. In the relevant passage at [50], the CJEU was dealing with the supply condition – see the preceding passage at [49]: *"the differences in the legal systems … are of no relevance to the assessment of the comparability of the games concerned"*;

- Indeed, if anything, *TNT Post* supports HMRC, since the CJEU at [38]-[39] assessed the comparability of postal service providers by reference to the context in which the relevant services were supplied, including the substantially different legal regime under which Royal Mail operated. The CJEU did not suggest that an assessment should be made as to whether the different legal regime would have a significant influence on the choice of the consumer.

33. The additional authorities on which the Appellants seek to rely at [34] (Case C-406/20 *Phantasialand* EU:C:2021:720 and Joined Cases C-454/12 and C-455/12 *Pro Med Logistik* EU:C:2014:111) are also not relevant here, in that the PVD did not impose a supplier condition on the grant of either of the reduced rates in question.

The Appellants' criticisms of the UT's interpretation of the caselaw on which it relied

34. At paragraph 35(i) of their skeleton, the Appellants take issue with the UT's reading of Case C-45/01 *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Giessen* ("***Dornier***"). The UT noted at **UTD[36]** that in *Dornier* the CJEU held that the national implementation of what is now Article 132(1)(b) had to be consistent with fiscal neutrality, but did not suggest that that consistency should be assessed from the point of view of the consumer, instead setting out a number of other factors for Member States to take into account when deciding which organisations to recognise.[4] The Appellants object to this, claiming that "*nothing in the Judgment in Dornier suggests that that assessment should take place other than by reference to the point of view of the*

[4] See *Dornier* at [72]: "*Those factors include the public interest of the activities of the taxable person in question, the fact that other taxable persons carrying on the same activities already have similar recognition, and the fact that the costs incurred for the treatment in question may be largely met by health insurance schemes or other social security bodies*."

consumer". The Appellants' assertion is fanciful – not only is there no mention anywhere in the *Dornier* judgment of the point of view of the consumer, but several other factors are expressly prescribed for the fiscal neutrality assessment (see *Dornier* at [74]).

35. In short, the UT's reading of *Dornier* was correct – in a case involving a *Kingscrest*-type supplier condition, the CJEU affirmed that Member States must respect the principle of fiscal neutrality when granting recognition – but never suggested that similarity should be assessed from the viewpoint of the consumer (still less solely from the viewpoint of the consumer, as the Appellants contend).

36. At paragraph 35(ii) of their skeleton, the Appellants turn to *Kingscrest*. They note (as stated at **UTD[37]**) that, in *Kingcrest* at [53], the CJEU cited *Dornier* when setting out the factors that national authorities should take into account when deciding which organisations to recognise as "*charitable*" for purposes of the exemptions at Article 132(1)(g) and (h) of the PVD.[5] The Appellants then set out that the CJEU in *Kingscrest* went on to state in the following paragraph that "*fiscal neutrality precludes… treating similar supplies of services, which are thus in competition with each other differently*". That uncontroversial statement of the principle of fiscal neutrality sheds no light whatever on the matter at issue in this appeal: namely, what it means for supplies of services to be "*similar*" when there is a supplier condition.

37. Nor does it assist the Appellants that the CJEU in *Kingscrest* set out the classic formulation of the principle of fiscal neutrality in the very next paragraph after setting out the factors that national authorities should take into account in deciding which organisations to recognise. On the contrary, the proximity of the two statements indicates that the CJEU does not see them as contradictory. Moreover, as the CJEU explained in Case C-44/11 *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG ("**Deutsche***

[5] The CJEU in *Kingscrest* added to the factors listed in *Dornier* (see FN 4 above): "*the existence of specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions*" – which supports HMRC's case that regulatory differences can provide an adequate justification for differences in VAT treatment. That specific form of words derives from Case C-141/00 *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* ("***Kügle**r*") at [58], cited by the CJEU in *Kingscrest* at [53].

***Bank**")* at [45], the principle of fiscal neutrality is not a rule of primary law that can determine the validity of an exemption or extend its scope, but rather a rule of interpretation which must be applied alongside the principle of the strict interpretation of exemptions.

38. Nor does the CJEU's citation in *Kingscrest* at [54] of Case C-109/02 *Commission v Germany* in any way support the Appellants' case. The paragraph of *Commission v Germany* cited in *Kingscrest* (paragraph 20) makes no mention here of the viewpoint of the consumer (nor is this the same paragraph cited in *Rank* at [34] and [43]). Further and in any event, *Commission v Germany* concerned the reduced rate of VAT, which does not involve a supplier condition, and therefore sheds no light on the question of what "similar" means for fiscal neutrality purposes when there is a supplier condition.

39. In short, the Appellants' criticism of the Upper Tribunal's reliance on *Kingscrest* is without merit. *Kingscrest* itself makes no mention of the viewpoint of the consumer, and also affirms, as the UT noted at **UTD[37]**, the relevance of specific provisions of domestic legislation in determining what organisations should be recognised by Member States as charitable.

40. In paragraph 35(iii) of their skeleton, the Appellants turn to *Zimmermann*. Whilst they do not here allege a specific interpretive error on the part of the UT, they seem to regard the fact that the CJEU dealt with fiscal neutrality towards the end of its judgment as somehow cancelling out the Court's earlier remarks about the permissibility of specific provisions of national law forming a basis for granting an organisation recognition as "*charitable*" for the purposes of Article 132(1)(g) – see *Zimmermann* at [31].

41. Such an interpretation is deeply misguided. As the CJEU recognised in *Deutsche Bank* at [45] and re-affirmed in *Zimmermann* itself at [49]-[50], the principle of fiscal neutrality is an interpretative provision, like a lens or filter, which must be applied *alongside* the principle that VAT exemptions are to be interpreted strictly. Fiscal neutrality is not a trump card, nor is it capable (without express provision to that effect) of expanding the scope of VAT exemptions. It does not negate or override the factors that Member States are expressly permitted (according to *Zimmermann* at [31]) to take into account when setting the criteria for recognition. Nor is it in any way surprising that the CJEU would mention fiscal neutrality (as an interpretive principle) *after* setting out the factors that

Member States expressly may take into account.

42. Neither does the citation of *Rank* in *Zimmermann* assist the Appellants' case. *Rank* is cited in *Zimmermann* only in support of the uncontroversial proposition that "*the principle of fiscal neutrality means that supplies of goods and services which are similar, and which are accordingly in competition with each other, may not be treated differently for VAT purposes*" (see *Zimmermann* at [48]). There is no mention of the consumer's perspective in the *Zimmermann* judgment, nor does the cited paragraph of *Rank* refer to that test. Accordingly, the fact that *Rank* is cited in *Zimmermann* does not lend any support to the Appellants' argument that, where there is a supplier condition, similarity is to be judged solely from the perspective of the typical consumer.

43. At paragraph 35(iv) of their skeleton, the Appellants turn to Case C-228/20 *I GmbH v Finanzamt H* ("***I GmbH***"). Here, they object to the UT's conclusion that the CJEU did not refer to the consumer's point of view when considering this supplier condition but did refer to it when considering the supply condition (see **UTD[45]**). This objection is groundless.

44. In *I GmbH*, the CJEU recognised at [37]-[38] that there are "*two cumulative conditions*" which must be satisfied for a provider to gain exemption under Article 132(1)(b) (the exemption for hospital and medical care and closely related activities):

> "*The first condition relates to the services supplied and requires that they be undertaken under social conditions comparable with those applicable to bodies governed by public law…*
>
> *"The second condition relates to the status of the establishment supplying those services and requires the operator to be a hospital, a centre for medical treatment or diagnosis or another duly recognised establishment of a similar nature*."

The first of these conditions is a supply condition, in that it relates to the status of the services supplied, whilst the second condition, relating to the status of the establishment supplying those services, is a supplier condition.

45. The CJEU considered the second of these conditions (the supplier condition) first, at [39]-[70]. The referring court was unsure whether the German law which reserved exemption to approved hospitals based on provisions relating to the general health insurance regime was compatible with that condition (see [39]). In addressing this, the

CJEU affirmed that it is in principle for the national law of each Member State to lay down the rules according to which establishments may be recognised for exemption and that Member States have a discretion in this regard (see [40]). However, that discretion is limited by the principle of fiscal neutrality (see [42]).

46. The Court then set out (still in the context of its discussion of the supplier condition) what compliance with the principle of fiscal neutrality means: "*compliance with fiscal neutrality requires, inter alia, that all organisations other than those governed by public law should be placed on an equal footing for the purpose of their recognition for the supply of similar services*" (see [63]). This is the first passage from *I GmbH* relied on by the UT (see **UTD[43]**). The UT was correct in its observation (see **UTD[45]**) that the CJEU did not refer to the consumer's perspective when discussing the supplier condition (see *I GmbH* at [39]-[70]).

47. The second passage cited by the UT (*I GmbH* at [83], quoted in **UTD[44]**) actually relates to the *supply* condition. In this context, the CJEU was specifically asked about the consumer's perspective (see [72]), but concluded that various factors (including the regulatory framework) could be taken into account (see [83]). This further undermines the Appellants' case that the viewpoint of the consumer is the only basis on which similarity can be assessed. In *I GmbH*, the CJEU indicated that various other factors can be taken into account, even in assessing compliance with a supply condition. Moreover, contrary to the Appellants' assertion, there is no mention of the consumer's perspective in paragraph [74] of *I GmbH* – nor is there any other express affirmation of the appropriateness of taking the consumer's perspective into account anywhere else in the judgment.

48. At paragraph 35(v) of their skeleton, the Appellants seek to undermine the conclusions that the UT drew from the CJEU's judgment in *Happy Education*. In particular, they assert that the lack of reference to the consumer's perspective is unsurprising, given that the Court did not discuss the requirements of fiscal neutrality, merely stating that its analysis is subject to that principle. However, the fact remains that, in *Happy Education*, the CJEU upheld a national law that distinguished between suppliers for VAT exemption purposes solely on the basis of whether or not the supplier had concluded a partnership with an educational establishment (see *Happy Education* at [19], [37]). There is no suggestion in the judgment that the conclusion of such a partnership would make any

difference to the consumers of after-school programmes, nor did the CJEU identify the consumer's perspective as in any way relevant to its analysis.

49. In conclusion, the Appellants' insistence that the consumer's perspective is determinative when applying a supplier condition flies in the face of a significant body of EU case law, as the UT correctly found (see **UTD[45]**).

Workability of the UT's test

50. The Appellants also assert (at paragraphs 38 to 44 of their skeleton) that "*on the UT's test, it is entirely unclear how the comparability of two suppliers by reference to the legal and regulatory framework is to be assessed if not from the point of view of the typical consumer*". This is not a legitimate criticism: the national courts are clearly able to distinguish between regulatory differences which are trivial and those which are significant (e.g. "*differences of degree and substance*", as the FTT here did – **[UT/20]**). Indeed, the CJEU itself had no difficulty, in *TNT Post* at [39], in determining (from the facts found by the national court) that the regulatory regime under which Royal Mail operated was "*substantially different*" to that under which TNT operated.

Ground (ii)

51. In their second ground, the Appellants contend that Member States cannot impose conditions for recognition which do not apply to other recognised suppliers. In particular, they say, the UK's reliance on distinguishing features which were not shared by all bodies to which the exemption under domestic law applies was wrong in law (see Appellants' skeleton at 47). In short, the Appellants assert that it is not permissible to have multiple "gateways" by which a supplier can qualify for exemption – all suppliers must be assessed for exemption by reference to the same criteria.

52. This ground amounts to an effort by the Appellants to re-litigate the Court of Appeal's decision in *FBT CA*. There, the Court of Appeal expressly affirmed that the UK was entitled to specify the conditions for non-public bodies to benefit from the education exemption, and that it was open to Parliament to exercise the UK's option by deciding

which non-public bodies were to qualify and then including a list of them in the relevant legislation (see *FBT CA* at [53]-[54]). Parliament's approach of listing the types of entities that were to qualify for exemption inherently involved the creation of multiple gateways to exemption, each to be assessed by reference to different criteria. In upholding this approach, the Court of Appeal affirmed the legitimacy of the UK's multiple-gateway approach to the education exemption. It is not open to the Court of Appeal in the present case to find that the UK was not entitled to specify multiple gateways into the education exemption.[6]

53. Parliament has provided three gateways whereby a provider offering the type of courses offered by the Appellants can benefit from exemption: (i) by becoming a university (which requires DAPs and university title – see **FTTD[78]-[79]**); (ii) by becoming a college, institution, school or hall of a university (which means being so integrated into a university as to be imbued with its objects – see *FBT CA* at [55]); or by becoming an FEC (which requires an organisation to be a charity – see s.22A FHEA 1992). Whilst it is true that not all exempt providers of such education are subject to all of these conditions, every exempt provider will meet the conditions for one of the gateways. The Appellants' problem, fundamentally, is that they do not meet the conditions for any of the gateways.

54. The Appellants' assertion that all exempt providers of higher education must be subject to the same conditions is not borne out in the case law:

55. *Zimmermann* stands for the limited proposition that private providers offering similar services must be placed on an equal footing for exemption purposes[7], but it says nothing to rule out multiple routes to exemption which are open equally to all non-public law

[6] The grounds on which the Court of Appeal may depart from its own previous decisions are set out in *Young v Bristol Aeroplane Company Ltd* [1944] KB 718 at 729-730). None of those grounds applies here.

[7] See *Zimmermann* at [43]: *"[c]ompliance with the principle of fiscal neutrality requires, in principle, that all the organisations other than those governed by public law be placed on an equal footing for the purposes of their recognition for the supply of similar services..."*

bodies. As regards the conditions for exemption, the CJEU expressly affirmed at [31] that "*specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions*" could legitimately be taken into account by Member States in specifying the conditions for exemption; what is not permitted are conditions that are "*not capable of ensuring equal treatment in relation to recognition*" (see *Zimmermann* at [63]).

56. The "eligible body" provisions in Group 6 of Sch 9 to VATA 1994 do not fall foul of that prohibition – the categories of "university" and "college of a university" are open to any organisation that complies with the applicable conditions. There is nothing systemic (such as a requirement to be non-profit-making, or a requirement to consider only services in the previous calendar year) that would bar the Appellants from qualifying. With respect to FEC status, the requirement to be a charity applies equally to all organisations – and a restriction of exemption to bodies that do not systematically aim to make a profit is specifically permitted under Article 133(a) PVD, as the UT recognised at **UTD[51]**.

57. Further, interpreting *Zimmermann* as saying that all private bodies have to be subject to the same conditions runs contrary to the CJEU's express statement in the judgment (see [50]) that fiscal neutrality is not to be used to extend the scope of exemptions. Using fiscal neutrality to override or ignore a supplier condition (as the Appellants seek to do here) would be to extend the scope of the exemption in just such an impermissible way to all supplies of higher education.

58. The Appellants also seek to rely on Case C-106/05 *L.u.P. GmbH v Finanzamt Bochum-Mitte* ("***L.u.P***.") as authority for the proposition that it is not permissible to have multiple gateways for a particular exemption – instead all establishments must be assessed according to the same conditions (see the Appellants' skeleton at 53). However, that is a misreading of the decision.

59. First, the provision of German law in issue in *L.u.P.* (paragraph 4(16)(c) of the 1993 UStG) was itself merely one of several gateways to the domestic exemption implementing Article 13A(1)(b) of the Sixth Directive (the exemption for hospital and medical care and closely related activities). Paragraph 4(16) of the 1993 UStG contained five subparagraphs, each specifying a different set of criteria whereby a particular type

of organisation could qualify for the exemption. The CJEU did not take issue with the existence of multiple gateways.

60. Rather, what concerned the CJEU in *L.u.P.* (as in *Dornier*) was the fact that sub-paragraph (c) of paragraph 4(16) required diagnostic clinics to operate under medical supervision in order to benefit from exemption. This was contrary to Article 13A(1)(b) which allowed exemption for medical care, including paramedical services given in hospitals under the sole responsibility of people who are not doctors (see *L.u.P.* at [51]). In other words, it was not the existence of different gateways that was the problem, but rather the existence of a condition (within a particular gateway) that applied to certain types of establishments but not others. There is no such condition here.

61. The permissibility of multiple gateways was again implicitly confirmed in *I GmbH*, where the CJEU again did not take issue with the German law's approach of listing different routes by which bodies could benefit from a particular exemption (see the description of the national law at issue in *I GmbH* at [8]-[9]). Rather, the CJEU was concerned (within the gateway for approved hospitals) that the conditions requiring inclusion in a Land-level hospital plan or the conclusion of a particular care supply contract resulted in comparable suppliers being treated differently (see *I GmbH* at [70]). The principle of fiscal neutrality requires that all private organisations should be placed on an equal footing (see *I GmbH* at [63]). In the present case, all private organisations seeking exemption for their supplies of higher education are placed on an equal footing – all of them must qualify as universities, as colleges of a university, or as FECs – but in respect of each gateway, the same criteria apply to all.

62. It is also worth noting that the Court of Appeal in *LIFE* did not find it problematic that Item 9 of Group 7 to Schedule 9 VATA 1994 provided multiple gateways by which private organisations might qualify for exemption – i.e. by being a charity or by being "*state-regulated*" and, in this context, the Court specifically considered paragraph [43] of *Zimmerman* (see *LIFE* at [48], [78]). This supports HMRC's case that it is permissible to have multiple gateways whereby private organisations can qualify for exemption, as long as there is no discrimination within each category.

63. In their skeleton at 60-61, the Appellants wrongly assert that s.22A FHEA 1992 *confers* charitable status on FECs, rather than imposing a requirement with which FECs must

comply. Respectfully, that is to put the cart before the horse, as the legislative history of that section reveals:

a. The original version of s.22A (October 1998 to January 2009) stated:

> *(1) A further education corporation shall be a charity which is an exempt charity for the purposes of the Charities Act 1993.*
>
> *(2) So far as it is a charity, any institution which—*
>
> *a. is administered by or on behalf of any further education corporation, and*
>
> *b. is established for the general purposes of, or for any special purpose of or in connection with, that corporation,*
>
> *shall also be an exempt charity for the purposes of the Charities Act 1993.*
>
> *(3) In this section "charity" and "institution" have the same meaning as in the Charities Act 1993.*

Here, given that the meaning of "*charity*" derived from the Charities Act 1993, it is plain that an institution had to qualify as a charity under that Act in order to qualify as an FEC. Paragraph 1(j) of Schedule 2 to the Charities Act 1993 also specifically provided that further education corporations were exempt charities. Thus, s.22A did not *confer* charitable status or exempt charitable status on FECs.

b. The second version of s.22A (January 2009 to March 2012) then stated:

> *A further education corporation shall be a charity within the meaning of the Charities Act 1993 (and in accordance with Schedule 2 to that Act is an exempt charity for the purposes of that Act).*

This version also requires an FEC to be charity, insofar as it imports the content of that term from the Charities Act 1993. Moreover, as noted above, it was Schedule 2 of the Charities Act 1993 (and not s.22A FHEA) that conferred exempt status on FECs.

c. The Charities Act 2011 was a consolidating act which replaced the Charities Act 1993. Paragraph 58 of Schedule 7 to that Act (entitled "*Consequential Amendments*") replaced the previous s.22A FHEA 1992

with the current version, applying from March 2012: "*A further education corporation shall be a charity (and, in accordance with Schedule 3 to the Charities Act 2011, is an exempt charity for the purposes of that Act)*." On the premise that a consequential amendment should not be interpreted as making any fundament change (as by a side wind) to the earlier act (see *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th edition, section 8.5), the current version of s.22A FHEA 1992 should be interpreted (like the preceding ones) as requiring FECs to have charitable status under the applicable charities legislation (which also grants them exempt status), and not as conferring that status on them. It follows that FECs, like other charities, are precluded from distributing their profits.

64. In light of the above and as the UT affirmed at **UTD[50]**, the FTT was entitled to distinguish the Appellants from universities (based on the substantially greater regulatory requirements that universities face), from colleges of universities (based on the close alignment of such colleges with universities), and from FECs (based on their charitable status). The conditions for each of these gateways apply equally to all suppliers seeking exemption by that route. Unlike in *Zimmermann*, there are no conditions for any of these gateways that apply to certain private providers, but not to others. Further, as the UT recognised at **UTD[51]**, Parliament was entitled under Article 133(a) PVD to restrict exemption in relation to further education to FECs on the basis that, as charities, they are bodies that must not systematically aim to make a profits and must not distribute any profits nevertheless arising.

B. TEFL

65. In their skeleton at 70-82, the Appellants argue that, once the UK recognised that IMAN fulfilled the supplier condition for the purposes of supplying TEFL, then *all* of its supplies of education must be exempt. The main issue here is whether the discretion conferred on EU Member States by Article 132(1)(i) PVD to recognise non-public bodies as fulfilling the supplier condition, i.e. as having similar objects to bodies governed by public law, is broad enough to enable Member States to confer that recognition in respect of a sub-set of their educational activities – and not all of them.

66. As indicated above, the *Kügler, Dornier, Kingscrest* and *Zimmermann* line of CJEU authorities allow each Member State to lay down the rules in accordance with which a body is recognised as having "*similar objects*" to a body governed by public law; those authorities also specify various factors (see FN 4 and FN 5 above) that Members States should take into account when deciding whether to grant recognition.

67. At **UTD[36]-[42]**, the UT correctly treated those passages from the caselaw on the exemptions in what are now Articles 132(1)(g) and (h) as applying by analogy to the education exemption in Article 132(1)(i). That line of authorities suggests that a Member State can recognise a body as having "*similar objects*" to a body governed by public law in respect of some, but not all, of its activities. For example, what if some of those activities are in the general interest, but others are not? Or some are covered by national or regional legislative or administrative provisions, but others are not? The fact that the national legislative and financing requirements for suppliers may differ across the education sector as a whole further suggests that a Member State can tailor its recognition under the supplier condition to the national background of each specific activity.

68. The practical difficulty with the Appellants' argument is that it would limit Member States' discretion to decide which supplier conditions to apply, so that (in practice) it would only be feasible to have a single supplier condition for the whole education sector, despite the wide diversity of the sector. That would itself be contrary to fiscal neutrality, effectively allowing a body with many educational activities to gain exemption in respect of all of them on the basis of only one activity that meets that supplier condition, whilst denying exemption to another body that carries on many of the same activities but not the one that meets the supplier condition.

69. The legal difficulty with the Appellants' argument is that they do not cite any CJEU authority to support their argument that a Member State cannot impose different requirements for recognition on the same supplier, depending on the type of supply of education or vocational training being made. By contrast, in *Happy Education* at [33], the CJEU appeared to explain that there was a specific supplier condition which related solely to the type of education at issue in that case:

> *"recognition as an organisation with similar objects to those of an educational body governed by public law, for the purposes of Article 132(1)(i) of Directive 2006/112, is granted under Romanian law primarily through the conclusion of*

> *a partnership with an educational establishment under the 'School after school' programme, in accordance with Article 58 of the Law on national education and the Methodology for organising the 'School after school' programme".*

70. In the remainder of its judgment, the CJEU did not suggest that applying specific recognition conditions to particular supplies was contrary to EU law. As the UT accepted at **UTD[48]**, the fact that the CJEU did not comment on that specific supplier condition in *Happy Education* "*is consistent with a Member State being permitted to impose different conditions for exemption for different types of education provided by the same supplier*". In their skeleton at 73, the Appellants seek to draw the inference from *Happy Education* at [27] that the concept of education is an autonomous concept of EU law. This was not supported by the CJEU. The CJEU said nothing about whether satisfying the narrow supplier condition in that case would have entitled the Romanian taxpayer to exemption in respect of supplies of any other types of education.

71. The Appellants then seek to rely on two UK cases to support their position: *Finance Business Training Ltd v HMRC* [2013] UKUT 594 (TCC) ("***FBT UT***") and *Pilgrim's Language Courses v CCE* [1999] STC 874 ("***Pilgrims***"). Neither actually assists them.

72. In their skeleton at 76-77, the Appellants rely on *FBT UK* at [37], where the UT stated that a body cannot be both a college of a university and not a college of a university at the same time and therefore a body cannot be both an eligible body in one capacity and at the same time not an eligible body in another capacity. There are three points here:

    a. First, *FBT UT* was a decision of the UT, which is at best only of persuasive authority in the Court of Appeal. Also, the *FBT UT* decision predates *Happy Education.*

    b. Second, the Appellants seek to extend the scope of *FBT UT* beyond what the UT actually said. As a matter of UK law, it may be true that (under the particular supplier condition chosen by the UK) a body cannot both be a college of a university and not a college of a university at the same time. That is because (as the Court of Appeal in *FBT CA* held at [55]) a body can only be a college of a university if it is integrated with the university and imbued with its objects – a body cannot at the same time both be integrated with a university and not integrated with a university. But that does not

mean as a matter of EU law that a Member State cannot apply different supplier conditions to different types of education made by the same supplier.

c. Third, contrary to the Appellants' skeleton at 77 and as the UT recognised at **UTD[70]**, the Court of Appeal in *FBT CA* disagreed with this aspect of the UT's decision.

73. In their skeleton at 78-79, the Appellants also rely on *Pilgrims*, referring to two excerpts from the judgment of Schiemann LJ at 885. When the whole of the relevant passage is read together, what Schiemann LJ said was that:

a. It was common ground between the parties in that case that a Member State could choose not to extend exemption to any bodies not governed by public law, even if they have similar objects to such bodies.

b. It was also common ground that Member States were at liberty to define organisations in such a way that where an organisation carries out several of the types of educational activities set out in Article 132(1)(i) some of them are excluded – so that education could be included but not vocational training.

c. Schiemann LJ then stated that he did not necessarily agree with what was common ground between the parties. HMRC submits that he was correct to express that reservation: the position summarized in sub-paragraph (a) above is inconsistent with the *Kingscrest* line of cases, under which a Member State has to look at its national regime (including legislation and funding) in order to see which organisations are already treated by the Member States as having similar objects. Schiemman LJ was also right to hesitate with respect to sub-paragraph (b) above: a Member State cannot simply decide that only bodies governed by public law ("**BGPL**") are entitled to exemption for their supplies of vocational training – and therefore organisations having similar objects to such bodies can only benefit from the exemption in respect of supplies of education. That would only be consistent with the *Kingscrest* line of cases if it was clear from the national regime for vocational training that no organisation (which was not

a BGPL) was treated as having similar objects to a BGPL.

74. But neither of those points deals with the question at issue in the current appeal: if a Member State does recognise non-BGPL organisations as entitled to exemption for different types of education and vocational training, can it impose different supplier conditions on them?

75. Schiemann LJ then addressed the sub-clause in Article 132(1)(i) under which a Member State is to exempt not just supplies of education and vocational training, but also "*the supply of services and of goods closely related thereto*", affirming that a Member State could not arbitrarily exclude non-BGPL from the exemption for closely related supplies. In the passage relied on by the Appellants in their skeleton at 78, the judge was again making a point about differential treatment between BGPL and non-BGPL recognised as having similar objects. The judge was *not* saying that a Member State could only impose one supplier condition on all non-BGPL recognised as having similar objects.

76. In their skeleton at 81-82, the Appellants argue that if Note 2 is contrary to EU law, it must be disregarded. That would leave Note 1(f) in place, without the limitation in Note 2. On that basis, IMAN would satisfy both the supply and the supplier condition in respect of all of its supplies of education.

77. As to this, the UK has recognised providers of TEFL as having similar objects to bodies governed by public law only to the extent that they supply TEFL. If the Appellants succeed in their argument on TEFL – so that the UK was not entitled to restrict recognition to an organization as having similar educational objects only to some of its educational activities – that would establish as a matter of EU law that the UK's implementation of Article 132(1)(i) PVD was defective.

78. But that then leaves a separate question of EU law as to what the result of the defective implementation is. As the CJEU recognised in Case C-846/19 *EQ* at [71]-[72] and in *MDDP* at [50]-[53], a taxable person can only rely on an EU law exemption as having direct effect where the Member States has exceeded its discretion, in which case it is for the national courts to apply the relevant exemption. Further, the taxable person can only rely on the Article directly "*if, according to objective evidence, the supply at issue meets the criteria for that exemption*" (see *MDDP* at [51]).

79. Therefore, IMAN cannot rely on EU law to disapply Note 2 – but then simply ignore the limits of the exemption under EU law in Article 132(1)(i). If it relies on Article 132(1)(i) to disapply Note 2, the UK courts must then determine whether IMAN would have been entitled to the exemption if the UK had properly implemented that Article. Thus, IMAN would have to establish that it should be regarded, in the light of all relevant factors, as having been "recognised" by the UK as having objects similar to BGPL having education or vocational training as their aim in relation to supplies other than TEFL.

80. In the present case, the UK has recognised IMAN as an eligible body only for the supply of TEFL. So, in order to gain exemption for its other supplies of education, IMAN would have to establish that it had objects which were similar to those pursued by BGPL in respect of those other supplies. That is precisely the task which IMAN is already seeking to carry out under Issue 1. Therefore, IMAN could only claim exemption for its non-TEFL activities under Issue 2 if it was already entitled to succeed on Issue 1 – with the result that Issue 2 adds nothing further to Issue 1.

C. CONCLUSION

81. For the reasons set out above, HMRC respectfully invite the Court to uphold the decisions of the UT and the FTT.

RAYMOND HILL
RHill@monckton.com
Monckton Chambers

LAURA INGLIS
laura.inglis@1cor.com
1 Crown Office Row

15 July 2025